No. 92-794

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In The

Supreme Court of the United States

October Term, 1992

COMMONWEALTH OF MASSACHUSETTS, et al.,

Petitioners,

v.

GREENWOOD TRUST COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF AMICI CURIAE OF THE STATES OF ALASKA, ARKANSAS, CALIFORNIA, CONNECTICUT, HAWAII, IDAHO, INDIANA, IOWA, KANSAS, KENTUCKY, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPI, NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, TENNESSEE, TEXAS, VERMONT, WEST VIRGINIA, WYOMING AND THE DISTRICT OF COLUMBIA IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURAIE

Twenty-seven states and the District of Columbia urge this Court to grant certiorari because of the nationwide disruption of state consumer protection laws that will be caused by the decision of the Court of Appeals for the First Circuit. This decision directly challenges the states' ability to enforce laws regulating late charges in consumer credit

transactions. By interpreting "interest" expansively for purposes of preemption analysis, the decision also places in doubt the validity of every state's consumer credit laws. This unwarranted intrusion into substantive state consumer credit policy overlooks both the language and history of the federal statute at issue and the fundamental premise that a state's historic police powers can be negated only with a clear mandate from Congress.

Consumer protection and consumer credit are traditional and critical areas of state concern. The amici states, like most other states, have established comprehensive regulatory systems to ensure fairness in the relationship between consumer borrowers and their creditors.[1] These laws reflect each state's own assessment of how to balance protecting consumers with providing creditors sufficient incentive to lend profitably to their residents. These statutes are largely modern enactments; for example, nine of the amici states have adopted substantial portions of the Uniform Consumer Credit Code.[2]

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[1] Typical areas of state consumer credit regulation include limitations on interest rates, restrictions on additional fees such as late charges, licensing and periodic examinations of lenders, requirements of truthful advertising, limitations on security interests and restrictions on debt collection practices. The need for state regulation in this area has long been judicially noted. *See Aldens, Inc. v. Packel*, 524 F.2d 38 (3d Cir. 1975), *cert. denied*, 425 U.S. 943 (1976); *Aldens v. Miller*, 610 F.2d 538 (8th Cir. 1979), *cert. denied*, 466 U.S. 919 (1980).

[2] The Uniform Consumer Credit Code's stated purposes include simplifying and modernizing laws governing consumer credit, providing adequate interest rate ceilings, fostering competition among creditors to ensure access to credit at a reasonable cost, and protecting consumers against unfair practices by "some" suppliers of credit. Uniform Consumer Credit Code, 1974 Act (U.L.A.) § 1.102.

SUMMARY OF THE ARGUMENT

Greenwood Trust aspires to a credit card operation unhampered by state consumer protection laws. In the lower courts it justified its disregard of these laws by claiming that section 521 of the federal Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDA) preempts state limitations on late charges.[3] However, the logical extension of the respondent's argument is not limited to these charges. If the lower court's decision is allowed to stand, credit card issuers will try to rely on section 521 to eviscerate virtually all state consumer protection controls in interstate banking transactions.

DIDA cannot support this weight. Its language and history demonstrate only a careful, very narrow preemption of state interest rate restrictions, not a comprehensive de-regulatory program that preempts numerous state statutes and allows one state's laws to take precedence over the laws of all other states. The lower court's decision supporting Greenwood Trust has seriously impaired the viability and enforcement of state consumer laws. Its approach to preemption leaves open to challenge numerous state laws regulating subject matters only tangentially touched by federal legislation. The decision is incorrect as a matter of law and policy and should be reversed.

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[3] Public L. No. 96-221, 94 Stat. 132. Section 521 is codified in part at 12 U.S.C. § 1831d.

REASONS FOR GRANTING THE PETITION

I. The Lower Court's Decision Throws the Enforcement of State Consumer Credit Laws into Disarray.

A. Background

Massachusetts prohibits the assessment of late charges on credit card accounts when consumers are delinquent in making payments. Greenwood Trust, the issuer of the Discover credit card, imposes such charges on Massachusetts residents. These charges are permitted in Delaware, where Greenwood Trust is located. Greenwood Trust bases its authority to "export" its late charge assessments on section 521 of DIDA, which, under certain circumstances, preempts state restrictions on interest rates.

Greenwood Trust's position stands or falls on how DIDA is interpreted. However, the respondent, as well as other lenders, also seek to rely on *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299 (1978), as authority to export these charges throughout the country. *Marquette* held that pursuant to 12 U.S.C. § 85, national banks may use the rate of interest permitted in the state where they are located even if that rate exceeds the rate permitted in the cardholder's state.[4]

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[4] After the *Marquette* ruling several states, including Delaware and South Dakota, abolished most of their consumer credit protection laws to attract consumer lenders on the theory that creditors located in their state could "export" deregulation throughout the country. *See* "Small States Teach a Big Banking Lesson," *Chicago Fed Letter*, June, 1988; Eckman, *The Delaware Consumer Credit Bank Act and "Exporting" Interest under Section*

By artificially defining "interest" to encompass all of Delaware law, Greenwood Trust now contorts the limited preemption approved in *Marquette* as authority to export the entirety of Delaware law throughout its cardholder base and to disregard contrary consumer protection laws of the cardholder's state.[5] This effort finds no support in *Marquette,* which limited exportation simply to the rate of interest allowed by the state where a national bank is located. Nor does DIDA refer to an explicit or implicit federal policy of preemption by allowing states to set comprehensive national standards for consumer lending.

The result of the lower court's decision may be to enshrine Delaware's policy of deregulation as a nationwide policy, regardless of other state laws to the contrary. This opinion elevates not federal law but Delaware law above the laws of each state, regardless of the decisions made in this area by each state's elected representatives.

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521 of the Depository Institutions Deregulation and Monetary Control Act of 1980, 39 Bus. Law. 1264, 1264-1267 (1984).

[5] Delaware aids this effort by legislatively expanding "interest" for exportation purposes to include "all terms, conditions and other provisions" of a credit card plan for purposes of section 521 of DIDA. Del. Code Ann. Tit. 5 § 955. These terms are declared "material to the interest rate" and, pursuant to the "most favored lender doctrine," lenders seek to export them to other states as part of the interest rate. However, the definition of "interest" under DIDA is one of federal law; Delaware cannot usurp Congress' role by redefining this term.

B. The Court of Appeals' sweeping definition of "interest" threatens to engulf a substantial portion of state consumer credit laws.

This Court should review the decision below because of its nationwide effect on the consumer protection laws of the other states.[6] The repercussions are not limited to disruption of state late charge restrictions. The lower court's determination that late charges are sufficiently "related to a creditor's cost of lending" and of "processing a loan" to constitute part of the "interest rate" implies that *any* state restriction affecting the cost of lending could be preempted. App. A-25 to 26.[7]

The lower court's analysis suggests that annual fees, over-the-credit-limit fees, replacement card fees and numerous other charges could be deemed part of the "interest rate" and therefore exportable under DIDA. In addition, creditors will assert that state laws which require grace periods on credit card purchases, establish "cure periods" before accelerating a late account, and restrict the assessment of attorney's fees and collection costs all affect their economic return and cost of lending

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[6] As noted by the Petitioners, thirty-two states regulate late charges in credit card transactions. Petition, p. 13. Some states, such as Idaho, currently do not regulate this particular area. However, the right to do so effectively in the future is jeopardized by the decision below.

[7] The lower court stated: "Suggesting that an additional fee attached to a delinquent, defaulted account is related to the creditor's cost of lending that money does no violence to language, to precedent, or, indeed, to logic. Default necessarily increases the creditor's cost of processing a loan."

and could be preempted under the lower court's expansive reading of DIDA.[8] Even state laws regulating debt collection practices arguably relate to the total return of the creditor; such associated costs could thus be included within DIDA's preemptive scope.

As a result, the decision below is inimical to the enforcement of numerous state consumer credit laws as they apply to interstate banking transactions. State regulators now face substantial uncertainty over which state laws regulate terms that could be defined as part of the "interest rate" and therefore are preempted under DIDA or the National Bank Act. Regulatory and enforcement actions will be delayed and state officials hindered in their efforts to enforce these laws. State legislatures reviewing consumer credit policy cannot reliably determine the extent to which they may continue to regulate in this area, regardless of the specific problems or concerns that may exist in their states.

The uncertainty surrounding the construction of section 521 also affects consumers and lenders. Consumers pay credit card issuers hundreds of millions each year in late fees and other charges not included within the finance charge. Petition, pp. 16-17. Many of these consumers reside in states prohibiting or limiting these charges; payment of these fees transfers an enormous

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[8] This conclusion is not speculative. As noted, Delaware adopted a broad definition of "material to the interest rate" to allow lenders to export just such items. *See* Del. Code Ann. tit. 5 § 955. In the lower courts Greenwood Trust has taken the position that DIDA allows banks to impose on a nationwide basis *any* credit terms allowed by the state where the bank is located.

sum of money from consumers to lenders in violation of their states' express public policy.

While the credit card industry desires the most expansive possible definition of "interest rates" for purposes of exportation, the decision below creates substantial uncertainty for them as well. Lenders must guess as to what other charges and terms, if any, are also exportable and risk litigation should cardholders or government agencies disagree with their decisions.

In addition, the Discover credit card, as well as credit cards issued by other Delaware-based lenders, are sent to consumers throughout the country.[9] The decision below affects not just the relationship between the respondent and Massachusetts, but also other credit card issuers, millions of consumer card holders, and the consumer credit laws of all other states.

II. The Decision Below Should be Reviewed as it Improperly Preempts State Law and Misconstrues the Scope of Section 521.

A. The lower court's preemption analysis is inconsistent with decisions of this Court.

"Consideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic

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[9] Six of the ten largest credit card issuers are located in Delaware. In 1991 these six banks accounted for roughly 26% of the total bank card receivables. Credit Card Management, *Card Industry Directory: The Blue Book of the Credit and Debit Card Industry in the United States*, 1992 ed. at 35, 68-72.

police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purposes of Congress.' " *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608, 2617 (1992), citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).[10] This axiom is essential to the states, as appropriate deference to state laws helps ensure that Congress supersedes state legislative enactments only through deliberate action. Principles of federalism demand no less.[11] By finding that state laws may be preempted by ambiguously worded federal laws, the lower court's opinion is incompatible with this Court's decisions.

The Court of Appeals examined section 521 and described at length its lack of clarity, specifically noting the uncertainty regarding what charges are included within the definition of "interest rate" and therefore

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[10] *See also Wisconsin Public Intervenor v. Mortier*, 111 S.Ct. 2476 (1991), 2481-2482; *California v. ARC America Corp.*, 490 U.S. 93, 100-101 (1989); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715-716 (1985); *New York Department of Social Services v. Dublino*, 413 U.S. 405, 413 (1973); *General Motors Corp. v. Abrams*, 897 F.2d 34, 41-42 (2d Cir. 1990) ("Because consumer protection law is a field traditionally regulated by the states, compelling evidence of an intention to preempt is required in this area.").

[11] As Chief Justice Rehnquist has emphasized: "Unless the requisite pre-emptive intent is abundantly clear, we should hesitate to invalidate state and local legislation for the added reason that 'the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden.' " *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 643 (1973) (Rehnquist, J., dissenting) (quoting *Penn Dairies, Inc. v. Milk Control Comm'n*, 318 U.S. 261, 275 (1943)).

exportable despite state laws to the contrary. App. A-17 to 22. The Court concluded that the statutory language and legislative history were "at bottom, inconclusive." App. A-41. Nonetheless, after reaching this conclusion, the Court of Appeals erroneously proceeded to examine federal common law and state law to derive its own definition of "interest" for purposes of section 521.

The requirement that preemption be found only when the intent is clearly communicated applies equally in determining the extent or scope of express preemptive language. Construing a preemption clause broadly after concluding its language is "inconclusive" contradicts the preemption principles set out in *Cipollone*. In examining the express preemption clause in the 1965 Federal Cigarette Labelling and Advertising Act, this Court stated that the presumption against preemption properly limited the range of the analysis and "reinforces the appropriateness of a narrow reading" of express preemption clauses. *Cipollone*, 112 S.Ct. at 2618.[12] Accordingly, ambiguous terms in express preemption clauses must be interpreted narrowly and in favor of preserving state laws.

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[12] In a separate opinion joined by Justices Kennedy and Souter, Justice Blackmun concurred with the majority and noted: "The principles of federalism and respect for state sovereignty that underlie the Court's reluctance to find pre-emption where Congress has not spoken directly to the issue apply with equal force where Congress has spoken, though ambiguously. In such cases, the question is not *whether* Congress intended to pre-empt state regulation, but to what *extent*. We do not, absent unambiguous evidence, infer a scope of pre-emption beyond that which clearly is mandated by Congress' language." *Cipollone*, 112 S.Ct. at 2626. (Emphasis in the original.)

Here, the lower court concluded that the relationship between late charges and interest rates was uncertain for purposes of preemption. The Court of Appeals should have then applied the standard clearly set out in *Cipollone* and acknowledged that the presumption against preemption eliminated the ability or necessity to conduct further review. This approach would have properly limited section 521 to its logical meaning – numerical interest rates. Instead, by forging ahead with a largely irrelevant analysis of common law usury cases and eventually concluding that the Massachusetts law was preempted, the decision misapplied important preemption principles.

Consequently, state laws regulating late charges and possibly a host of other consumer laws are now preempted for purposes of DIDA, even though neither DIDA's language nor legislative history supports this result. The decision severely damages state authority to regulate consumer credit and is unsupported by prior decisions of this Court. Further, the decision's preemption approach threatens state laws in other areas jointly regulated by the states and federal government.

B. The Court of Appeals' decision reverses the federal government's policy in consumer credit.

Examining Congress' traditional approach to regulating consumer credit helps in discerning Congress' intent in section 521. The federal role is noteworthy for its limited nature and for the deference regularly provided to state substantive law. Rarely does federal law govern the actual terms, charges and conditions of consumer credit transactions; such concerns are generally left to the

states. Rather, federal law generally preempts state law only when it offers either *less* protection or is inconsistent with federal law.

For example, the federal Truth-in-Lending Act, 15 U.S.C. § 1601 *et seq.*, regulates consumer lending disclosures but explicitly leaves intact substantive state consumer protection laws. *See* 15 U.S.C. § 1610(b).[13] Similar deference to state law is demonstrated in the Equal Credit Opportunity Act, 15 U.S.C. § 1691d(f), the Fair Debt Collection Practices Act, 15 U.S.C. § 1692n, and the Electronic Fund Transfers Act, 15 U.S.C. § 1693q. Accordingly, while section 521 authorizes a limited intrusion into the domain of state consumer credit policy by preempting state "interest rate" laws, Congress' general practice with regards to consumer credit argues for narrowly reading the scope of section 521.

DIDA's "opt-out" provisions further support a narrow construction of the Act vis-a-vis state consumer laws. In section 525 Congress permitted states to negate DIDA's preemptive effect entirely if a state legislature passed an

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[13] This section states in part: "This subchapter does not otherwise annul, alter or affect in any manner the meaning, scope or applicability of the laws of any State, including, but not limited to, laws relating to the types, amounts or rates of charges, or any element or elements of charges, permissible under such laws in connection with the extension or use of credit . . . . "

enactment expressing its intent to do so.[14] Senator Proxmire described the opt-out provisions on the Senate floor prior to final passage of the bill:

> The presumption [sic] of usury laws does not derogate State authority. Under the usury provisions, each State may reimpose its usury limits, if it so desires. We do not take that away from the States. They can put those usury laws back into effect.

126 Cong. Rec. 7070 (1980).

Several of the amici States have opted out of DIDA.[15] The opt-out clause demonstrates the restrained role taken by Congress in 1980 in preempting certain state usury laws and its intent that states maintain overall control in the consumer credit area. This clause also contradicts Greenwood Trust's assumption that DIDA was intended as a vehicle permitting credit card issuers to export one state's law throughout the country.

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[14] The "opt-out" provisions in section 525 were codified as notes to the relevant DIDA sections, including section 521. *See* 12 U.S.C. § 1831d (under "Effective Date").

[15] In other litigation, credit card issuers have contended that a state's "opt-out" option only applies to lenders located in the state and is ineffective against banks located in states which have not opted out. This argument was made in *United Missouri Bank, U.S.A. v. Thomas J. Miller as Attorney General of the State of Iowa*, C.A. 88-1343-E (S.D. Iowa 1988), which was settled without a resolution on the merits. Therefore, the lower court's decision is of significant concern even to those states which have opted out of DIDA.

C. The decision below incorrectly determined that "interest rates" include late charges or other terms related to the cost of lending.

The states' ability to legislative effectively to meet the needs of their citizens is significantly affected by how DIDA is interpreted. The inconsistency between the lower court's ruling and Congress' intent to narrowly define "interest" in DIDA for preemption purposes compels review of the decision.

DIDA's statutory language regarding preemption consistently modifies "interest" with "rate"; the most plausible conclusion is that preemption is limited to numerical interest rates. This interpretation is consistent with DIDA's primary purpose of removing unrealistically low state numerical interest rate restrictions during a time of significant credit shortages and high inflation. Even assuming the continuing relevance of this concern during a period of historically low interest rates, limiting DIDA to numerical interest rates rather than charges and terms "related to the creditor's cost of lending" does not contradict Congress' intent to ensure consumers have sufficient access to credit.[16]

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[16] As one court noted: "The DIDMCA [DIDA] is hardly a Congressional expression of distaste with state usury laws generally, but a compromise with the ideals of such laws – that there should be limits upon rates of interest that lenders can legally charge – in a time of crisis. Moreover, the crisis has passed. Therefore, applying the DIDMCA to any transactions other than those which it is very clearly provided are within its scope would fail to recognize the context of this law in the scheme of the inter-relationship between federal and state law." *In Re Russell*, 72 B.R. 855, 867 (Bankr. E.D. Pa. 1987)

DIDA's legislative history also confirms Congress' intent to draft DIDA narrowly to preserve state laws. In section 501, an analogous provision designed to remedy the shortage of available mortgage credit through preemption of state usury laws, Congress preempted state laws governing the "rate or amount of interest, discount points, finance charges, or other charges" assessed in connection with federally related mortgage loans. 12 U.S.C. § 1735f-7a(a). The report of the Senate Banking Committee on the bill ultimately passed as DIDA specifically limited the scope of this preemption provision to "only those limitations that are included in the annual percentage rate. *The Committee does not intend to exempt limitations on prepayment charges, attorney's fees, late charges or similar limitations designed to protect borrowers.*" S. Rep. No. 368, 96th Cong. 2d Sess. 19 (1979), *reprinted in* 1980 U.S. Code Cong. & Ad. News 236, 255. (Emphasis added.)

This report corroborates that the plain meaning of DIDA is to preempt *only* restrictions on numerical interest rates. The California Supreme Court acknowledged the significance of this history for purposes of determining DIDA's preemptive reach: "Moreover, when in the 1980 Act Congress expressly preempted state usury laws, it deliberately left in effect other provisions of state law regulating charges in contracts between banks and borrowers." *Perdue v. Crocker National Bank*, 702 P.2d 503, 522-523 (Cal. 1985), *appeal dismissed*, 475 U.S. 1001 (1986).[17]

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[17] The decision below concluded that sections 501 and 521 were only "distant cousins" and therefore dismissed the relevance of section 501's legislative history. App. A-49 to 50, note

Assuming it is necessary to look outside DIDA to define "interest rates" for purposes of federal law, then the Truth-in-Lending Act, 15 U.S.C. § 1601 *et seq.*, is directly on point. This Act exhaustively defines terms used in consumer credit transactions and clearly differentiates between interest rates and late charges. In Truth-in-Lending, "finance charges" includes "interest" as one of its components.[18] Late charges are specifically *excluded* from the definition of "finance charge." 12 C.F.R. § 226.4(c)(2). When determining the finance charge and annual percentage rate for a transaction, the lender must exclude from the calculation any late charges which are assessed. This exclusion was made even more explicit when Truth-in-Lending was amended in 1988 by the Fair Credit and Charge Card Disclosure Act. Pub. L. No. 100-583, 102 Stat. 2960. This Act established guidelines for advertising credit card plans and specified that late charges be disclosed separately from the annual percentage rate. 15 U.S.C. § 1637(c); 12 C.F.R. § 226.5a(b).

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10. The amici states believe this determination is in error. The applicability of section 501 and its history is apparent. Sections 501 and 521 were enacted as part of Title V of DIDA and address identical credit concerns. Both sections support a limited displacement of state interest rates and link the term "interest" with "rate." There is no reason why the definition of "interest" in section 501 should explicitly exclude late charges and other fees, while section 521, by implication, was meant to include them.

[18] In Regulation Z the Federal Reserve Board states that the definition of finance charges is not limited to "interest" but includes a variety of other charges, including service, transaction, activity and carrying charges, points, loan fees, assumption fees, finders fees, appraisals, and credit reporting fees. 12 C.F.R. § 226.4.

Truth-in-Lending provides the most current example of how Congress views the relationship between interest and late charges and provides a much surer ground for defining "interest" in this case than common law definitions unrelated to credit cards and modern consumer credit legislation. Limiting "interest" to fixed, numerical rates as defined in Truth-in-Lending provides a clear-cut and realistic limitation on DIDA's preemptive effect on state consumer credit laws. When the Court of Appeals found the language and legislative history of section 521 was "at bottom, inconclusive" it should have interpreted DIDA in this manner and avoided preemption of state law.

CONCLUSION

Contrary to the Court of Appeal's extended analogy, this case is not a "train wreck" involving the collision of state consumer and federal banking laws. App. A-4. Rather, the dual engines of Mass. Gen. L. ch. 140, § 114B, and section 521 of DIDA may operate on parallel tracks, at full efficiency and without crossing each other's path. Neither must yield the right of way.

For these reasons twenty-seven states and the District of Columbia respectfully request this Court to grant the Commonwealth's petition for writ of certiorari.

Dated: December 4, 1992

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